senting opinion in the *Ludwig* case. Steere, C. J., and Stone, and Fellows, JJ., adhered to what had been their prevailing view in the earlier case, namely, that survivorship in joint ownership of personal property would not be recognized even though the parties make it clear that they intend such incident to attach.

The decision in the principal case purports, according to the prevailing opinion, to be entirely consistent with the earlier cases in the State. It is, however, a rejection of the view announced in the court's opinion in the *Ludwig* case that the quality of survivorship can not be attached by an expression of intention to that effect. In dealing with this question Michigan lawyers must address themselves to this inquiry: have the parties contracted for the incident of survivorship? According to the *Ludwig* case no such contract or intention is shown by a provision in the instrument of title that the co-owners are to hold "as joint tenants." But if there are added the words "with sole right to the survivor," then, according to the principal case, there is joint tenancy as at common law so far as survivorship is concerned.

There remains to be said only that at common law joint tenancy was applicable to personal as well as real property. LITT. 281; Co. LITT., 182a; 2 KENT'S COMM.* 350. An early exception was made as to the incident of survivorship in the case of property used in trade or agriculture. 2 KENT'S COMM., *350. And the same general policy against joint tenancies in realty has found some expression in the case of personalty. SCHOULER, PERS. PROP. § 156. The public policy of the State of Michigan regarding this matter is perhaps indicated in part at least by COMP. LAWS OF 1915, sec. 8040, wherein it is provided that deposits in bank in the name of the depositor or any other person, "and in form to be paid to either or the survivor" thereby become the property of such persons "as joint tenants," with right of survivorship. This statute which is a copy of a New York Act was held valid in *In re Rehfeld's Est.*, 198 Mich. 249. R. W. A.

POWER OF A COURT TO PUNISH WHEN THE PRESCRIBED PUNISHMENT BECOMES IMPOSSIBLE—"It is to be noted, that penal statutes are taken strictly and literally only in the point of defining and setting down the fact and the punishment, and in those clauses that do concern them, and not generally in words that are but circumstances and conveyance in the putting of the case, and so see the diversity; for if the law be, that for such an offense a man shall lose his right hand, and the offender hath had his right hand before cut off in the wars, he shall not lose his left hand, but the crime shall rather pass without the punishment which the law assigned, than the letter of the law should be extended."—BACON'S LAW TRACTS, 75.

The legislature of Washington in 1919 provided for the creation of a penal institution for women and appropriated funds for its maintenance during the ensuing biennium. The act provided that all women over 16 years of age *might* be and all women over 18 years of age *must* be, confined in this institution when convicted of any gross misdemeanor or of any felony except murder, arson, or robbery. At its biennial session in 1921, the legislature passed an appropriation bill for the maintenance of this institution for

another two years but this bill was vetoed by the governor after the legislature had adjourned. The institution was closed April 1, 1921, for want of funds. One week later, the defendant was convicted of the crime of adultery. The lower court committed her to this institution but, there being no way of carrying the committment into effect, the woman was held in the county jail. On an original application to the supreme court for a writ of *habeas corpus* seeking her discharge from custody, a majority of the court held that the failure of the legislature to make an appropriation for the institution in 1921 effected a repeal of the Act of 1919; that this exception to the prior law being now repealed, the prior law would be fully operative and she should be sentenced as provided in this prior law. *Ex parte Williamson* (Wash. 1921), 200 Pac. 329.

Admitting that the Act of 1919 was repealed and that this act was only an exception to the prior law as to felonies and misdemeanors, then the decision —that the exception being taken away, the prior statute is to be applied without the exception—is sound. 25 R. C. L. 934; *Manchester Township Supervisors* v. *Wayne Co. Comm.*, 257 Pa. 442.

But did the majority of the court come to the right conclusion when they held that failure by the legislature to make an appropriation for the institution effected a repeal of the law requiring offenders to be confined in that institution? Certainly the legislature did not intend that law to be repealed, for before adjournment it passed an appropriation measure for the institution. True, the governor vetoed the appropriation measure, but could that operate as a repeal of prior legislation? The three dissenting judges answered that question by saying: "While admitting the governor's power to veto an appropriation, I cannot consent to the idea that, by such a veto, the governor can, in effect, repeal prior, properly enacted, positive, statutory provisions for the punishment of crime."

If then the Act of 1919 was still in force, we have a case of one convicted under a statute where the prescribed mandatory punishment has become impossible of being enforced.

An analogy to this state of facts might be drawn from the case of *United States* v. *Union Supply Company*, 215 U. S. 50. In that case a corporation was proceeded against criminally for an offense punishable under the statute by fine *and* imprisonment. The corporation clearly could not be subjected to the imprisonment. It was held that when a statute prescribes that two independent penalties shall both be inflicted, the inference is that the legislature intended them to be inflicted as far as possible, and that, if one of them is impossible, the legislature did not intend on that account that the defendant should escape. Upon conviction the defendant corporation was subjected to a fine only. In the principal case, the whole penalty has become impossible of enforcement, but, applying the analogy, we would say that, although the punishment stipulated has become impossible, still the legislature did not *intend* on that account that the offender should go free, and it merely results in a law which prohibits certains acts but provides no penalty. Does a court then have power to punish one who violates such a statute? The common law rule in such a case is that "wherever a statute prohibits a matter of public

grievance to the liberty and security of the people, or commands a matter of public convenience, without enacting any penalty for disobeying its prohibitions or commands, an offender against such a statute is punishable by way of *indictment for his contempt of its enactments,* and may be sentenced to pay a fine for his offense." *State* v. *Fletcher,* 5 N. H. 257. Under such a rule, the court should have sustained the *habeas corpus* proceedings in the principal case, but the defendant could then have been indicted under the common law for her contempt of the enactment. But in a state where the common law is not in force and this common law indictment therefore not available, the court has no inherent power to punish one who violates a statute for which no penalty is provided and the result is that the offender goes free. *State* v. *Gaunt,* 13 Ore. 115.

Again, in a jurisdiction where the court will look behind the words of the statute to the intent of the legislature, one might suggest that, rather than construe the two statutes as together prohibiting the act but providing no enforcible penalty, the court should construe the later statute by reading into it the additional words: *"so long as this institution shall be maintained,* women over 18 years of age must be confined therein." With this interpretation, the former law would become operative as soon as the institution was closed. But these words should not properly be read into the statute. At first glance, it would seem to be analogous to the case where the statute prohibits selling liquor to a minor. The defendant sells to the minor not knowing he is a minor. The court feels that the legislature did not intend such a defendant to come within the statute and so reads the word *"knowingly"* in the statute. *Adler* v. *State,* 55 Ala. 16. But it is to be noted that in that case, reading the additional word into the statute resulted in favor of the offender while reading the suggested words into the statute of the principal case would result to the disadvantage of the defendant. The better rule is that "the benefit of the doubt should be given to the subject, and against the legislature which has failed to explain itself." MAXWELL on INTERPRETATION OF STATUTES (5th Ed.), p. 460.

Many courts, however, refuse to look for a legislative intent as to punishment when the prescribed mandatory punishment fails, for here the court is confronted with one of those cases where the legislature had no intent—where the court is called upon to guess what the legislature would have intended if the question had been brought to its mind. These courts follow the rule, as laid down by Bacon, *supra,* that "penal statutes are taken strictly and literally in the point of setting down the fact and the punishment" and "the crime shall rather pass without the punishment which the law assigned rather than the letter of the law should be extended." In *Weems* v. *United States,* 217 U. S. 349, the defendant was convicted of defrauding the United States Government of the Philippine Islands and was sentenced in accordance with the requirements of the statute. On appeal, the mandatory penalty was held unconstitutional as being a cruel and unusual punishment. The court there did not say that the evident intent of the legislature was that a defrauder of the government should be punished and, if the prescribed punishment failed, the court might substitute some other punishment. On the contrary, it said the case

could not be remanded for new sentence but the judgment must be reversed with directions to dismiss the proceedings. This, of course, would result in the defendant going free, but these courts hold that the fault is in the statute and it rests with the legislature to make the alteration. As was said by Lord Tenterden in *Rex* v. *Barham,* 8 B. & C. 104; "Our decision may perhaps operate to defeat the object of the statute; but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the act in order to give effect to what we may suppose to be the intention of the legislature." L. W. K.

PUBLIC UTILITIES—RATES FIXED BY MUNICIPALITY UNDER POWER TO REGULATE AND FIX RATES—The principal cases dealing with the power of municipalities to contract with public service companies for service rates, and of the legislature to override such contract rates, have been considered in 19 MICHIGAN LAW REVIEW 886 and previous notes there referred to. The rules of law have been gradually evolved, with results full of surprises to the public and to the companies. The latter felt the first painful jar in what may fairly be called the leading case in this field, *Home Telephone Co.* v. *Los Angeles,* 211 U. S. 265. In the more recent cases it has in general been the public that has suffered pain. Neither side has accepted punishment very gracefully, and the contest has not helped to develop that good feeling between them that is so desirable if the utility company is to prosper and the public is to be well and reasonably served. It is not the purpose of this note to refer to all of the many very recent cases as few of them make any material contribution to the subject, and these few have been considered in previous notes.

The attempt will be rather to try to state clearly such results as seem settled. That there is still room for such clear statement seems the more evident from the fact that judges continue to mis-apply the law in cases which seem so evidently governed by previous decisions that one would think that not even lawyers would argue to the contrary. Neither side seems willing to accept those results, and both continue to make contention of points which should be taken as settled unless and until the decisions are changed by statutes or constitutions. Not all the cases, of course, are so clear, but for the doubtful, clear distinctions are of great value. The doubt now rests mainly, not wholly, in the application, rather than in the statement of principles.

It is to be remarked on this whole matter that usually the golden rule would work better for both parties than any rules of law, but past experiences have bred so much suspicion as to the truthfulness and good faith of the parties, and left so much antagonism, that the public, remembering perhaps the insistence of corporations on the unreasonable advantages of franchise provisions obtained sometimes by false tampering with the representatives of the people, is now in most cases unwilling to release the corporations from any franchise provisions in its favor, even in cases where rates have become unremunerative, and involve the bankruptcy of the corporations. Perhaps this unwillingness to permit any increase in rates is because the public believes no claim made by the corporations, but certainly it can